Court of Appeals No. 43736-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

LANCE WILLIAM EVANS,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 12-1-00934-3
The Honorable John A. McCarthy, Presiding Judge

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III. STATEMENT OF THE CASE

A. Factual Background

On March 14, 2012, Lakewood Police Department received a 911 call from a resident of the Avalon Place Apartments, who reported that his

neighbor had "knocked on his back window and advised there was someone in her apartment that had her daughter held at gun point." CP 68.

At 6:00 p.m. on March 14, Lakewood Police Officers Prater and Grant arrived at the apartment complex, and through an open door, observed a male sitting on a chair inside apartment number 17. *Id.* Officer Prater also observed a "heavy set female" standing outside by apartment 17, talking on a cell phone. CP 68. Officer Grant commanded the male to walk towards the officers, and the male complied. *Id.* He was ordered face down on the ground, searched, and arrested at 6:03 p.m. for unlawful possession of a weapon and "discharge/display/aiming/pointing a weapon." *Id.;* CP 56; CP 64.

While Officer Grant was arresting and searching the male, Officer Prater requested the name of the reporting party (Mr. Johann) and his apartment number (18) from LESA Dispatch, then interviewed Mr. Johann. CP 68. Mr. Johann told Officer Prater that "he didn't know" "what was going on," because "he was not inside apt #17 at all." *Id.* Mr. Johann stated that his neighbor from apartment 17 had knocked on his back window and "told him there was a man inside her apt waiving a gun around and not letting her daughter leave the apt." *Id.* Mr. Johann did not know the name of his neighbor, but pointed her out to Officer Prater as a woman who was seated in the back seat of a car near the apartment

complex. *Id.*

Officer Prater then contacted the woman:

> I contacted Karen Rojo and asked her if she could tell me what was going on. She told me her daughter's friend (Lance) had come to her apartment carrying a brown "man purse." She told me he was upset because her daughter owed him money "for something." Rojo told me Lance was at one point waiving a "small black gun" around and telling everyone inside the apartment, "No one is leaving until I get my money." I asked Rojo if the gun looked as though it was a real gun. She told me it looked real enough to her.

Id.

Ms. Rojo told Officer Prater that Lance had taken the gun out from the "man purse," and that the gun was on Lance's person the last time she saw it. *Id.* While Officer Prater was interviewing Ms. Rojo, Officer Olsen was interviewing two younger females "(one of which was the daughter of ROJO)" inside of the apartment (CP 68), but the females "were being vague in their responses and not providing Officer Olsen with "enough information about the incident." *Id.* Both females refused to write statements, "and stated how Lance was really a good guy and he is 'just going through some tough times.'" CP 69. Officer Prater asked the "heavyset female" he had observed outside of apartment 17 whether she felt she could leave the apartment after Lance said "something along the lines of 'no one is leaving until I get my money,' and she responded, "if

she really wanted to leave she 'probably could have.'" *Id.*

Officer Prater then asked the male lying on the ground if his name was Lance, to which the male responded affirmatively. *Id.* Officer Prater advised Defendant Lance Evans of his constitutional rights at 6:09 p.m., which Mr. Evans stated he understood, and then agreed to speak with Officer Prater. *Id.*

Mr. Evans told Officer Prater that he had come to the apartment to get back money he had loaned to one of the females inside the apartment. *Id.* He denied having a handgun with him and denied that he had left any of his belongings inside the apartment. *Id.*

Lakewood Police Officer Hamilton brought the "man purse" outside and asked Mr. Evans if it belonged to him, which Mr. Evans denied. *Id.* Officer Hamilton continued questioning Mr. Evans about the purse, and "[e]ventually Lance confessed to being the owner of the bag." CP 69.

In response to Officer Hamilton's questioning, Mr. Evans told him that the bag contained "several knifes [sic] and a .380 handgun," and that "the magazine to the weapon would be loaded but that there would be a round in the chamber." CP 65. Mr. Evans also told Officer Hamilton that he had a felony conviction and admitted that he knew "he knew he wasn't suppose [sic] to possess" the gun. *Id.* Officer Hamilton received

permission from Mr. Evans to take possession of the items in the purse, and removed the firearm from the bag "to ensure the weapon was not loaded and in a safe condition for transport." *Id;* CP 69.

Mr. Evans was transported to the Pierce County jail and booked for unlawful possession of a firearm in the first degree; intimidation with a weapon; and carrying/possession of a firearm/weapon. CP 57; CP 65.

B. Procedural Background

On March 15, 2012, Mr. Evans was charged with one count of unlawful possession of a firearm in the second degree in violation of RCW 9.41.040(2)(a)(i), and one count of violation of RCW 9.41.270(1)(2) by unlawfully carrying, exhibiting, displaying or drawing any "firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons." CP 1-2.

On April 24, 2012 Mr. Evans filed a Motion to Suppress evidence "obtained by plaintiff in its warrantless search of defendant's bag." CP 4-10. On June 22, 2012, the State filed a Motion for admission of Defendant's statements made after Miranda warnings. CP 19-24.

The trial court heard the Motions on June 26, 2012, granting the

State's Motion to admit Mr. Evans' post-Miranda statements at trial (RP47-48), and denying Mr. Evans' Motion to Suppress evidence, ruling that Mr. Evans had consented to the search of his bag. RP 47-49. Also on June 26, 2012, the State amended the charges against Mr. Evans to drop the charge of unlawfully carrying or displaying a firearm. CP 33. In conjunction with the amended information, the State filed a Statement indicating that the charges were being amended because Mr. Evans agreed to enter a plea in the case. CP 34.

Following the court's oral ruling, Mr. Evans signed a stipulation that "the State's evidence is sufficient to support each and every element of the crime alleged," giving up the right to contest sufficiency of the State's evidence; giving up the right to representation by a lawyer; giving up the right to a speedy trial; giving up the right to remain silent and the right to refuse to testify against himself; giving up the right to hear and question witnesses; giving up the right to have witnesses testify for him; and giving up the presumption that he was innocent unless the charge was proven beyond a reasonable doubt or he entered a guilty plea. CP 35-CP 36.

The Stipulation also includes a paragraph stating, "I hereby stipulate that the State has sufficient evidence in the form of the police reports and the testimony of Officers Prater and Hamilton, to prove each

and every element charged beyond a reasonable doubt." CP 37. Finally, the Stipulation includes the following sentence: "I hereby include and incorporate by reference the Court's ruling on admissibility by the Honorable Judge John A. McCarthy and Findings of Fact and Conclusions of Law, to be entered on or about _____, as to that hearing." CP 38. The Court did not enter Findings and Conclusions until July 10. CP 91.

Mr. Evans timely filed a Notice of Appeal on July 24, 2012. CP 97.

IV. ARGUMENT

1. All evidence discovered pursuant to Mr. Evans' arrest was inadmissible since Mr. Evans was arrested without probable cause.

(a) Mr. Evans may challenge his arrest for the first time on appeal.

RAP 2.5(a) provides, in pertinent part, "The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court:...(3) manifest error affecting a constitutional right."

Appellate courts have a "long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal." *State v.*

Contreras, 92 Wn.App. 307, 313, 966 P.2d 915 (1998).

"[F]or this RAP 2.5(a)(3) exception to apply, an appellant must show both that (1) the error implicates a specifically identified constitutional right, and (2) the error is "manifest" in that it had "practical and identifiable consequences" in the trial below." *State v. Bertrand*, 165 Wn.App. 393, 267 P.3d 511, 515 (2011), r*eview denied* 175 Wn.2d 1014, 287 P.3d 10 (2012).

"If an appellant successfully shows that the error is both constitutional in magnitude and "manifest," in that it had practical and identifiable consequences below, the burden then shifts to the State "to prove that the error was harmless ... under the *Chapman* standard"[1] beyond a reasonable doubt." *Bertrand*, 165 Wn.App. 393, 267 P.3d at 515.

i. The unlawful arrest of Mr. Evans was an error of constitutional magnitude.

"To determine whether an error is truly of constitutional dimension, appellate courts first look to the asserted claim and assess whether, if the claim is correct, it implicates a constitutional interest as

[1] *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). *Chapman* held, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman*, 386 U.S. at 24, 87 S.Ct. 824. "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Chapman*, 386 U.S. at 23, 87 S.Ct. 824.

compared to another form of trial error." *State v. Grimes*, 165 Wn.App. 172, 267 P.3d 454, 462 (2011), *review denied* 175 Wn.2d 1010, 287 P.3d 594 (2012), *citing State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009).

As will be discussed in greater detail below in sections 1(b) and 1(c), Mr. Evans was seized without probable cause, rendering his seizure unconstitutional under the Fourth Amendment and under Article 1, § 7. Because Mr. Evans was seized without probable cause in violation of both the Washington State Constitution and the Federal Constitution, the unlawful seizure of J.I. is an issue of Constitutional magnitude.

ii. The "error" of Mr. Evans being seized without probable cause is a "manifest" error since all evidence that he actually possessed a firearm was discovered pursuant to his seizure.

> After determining the error is of constitutional magnitude, the appellate court must determine whether the error was manifest. For an error to be "manifest," the defendant must show that the asserted error had practical and identifiable consequences at trial. Given what the trial court knew at that time, to ascertain whether the trial court could have corrected the alleged error, the appellate court must place itself in the shoes of the trial court when determining if an alleged error had practical and identifiable consequences.

Grimes, 165 Wn.App. 172, 267 P.3d at 462 (internal citations omitted).

As will be discussed in more detail below in sections 1(b) and 1(c), all evidence that Mr. Evans actually possessed a firearm was discovered

pursuant his unlawful seizure. The introduction of this evidence had practical and identifiable consequences because without the introduction of the evidence of the firearm found pursuant to the arrest, the State would have had insufficient evidence to convict Mr. Evans. As will be discussed further below in section 2(a), had the admission of the evidence been challenged on the basis that the evidence was derived from an unlawful seizure, the trial court would have granted the motion to suppress and dismissed the case for lack of evidence. Thus, the "error" of Mr. Evans' unlawful seizure was "manifest" in that it had the "identifiable consequence" of leading to a search which produced the evidence which allowed the State to convict him at trial.

iii. The "error" of unlawfully seizing Mr. Evans was not "harmless."

> If an alleged error has practical and identifiable consequences, i.e., if it is "manifest" and also of "constitutional magnitude," the reviewing court usually will address the merits of the claim and determine whether, in the context of the entire record, the error is harmless beyond a reasonable doubt. To find an error harmless beyond a reasonable doubt, an appellate court must find that the alleged [...] error did not contribute to the verdict obtained.

Grimes, 165 Wn.App. 172, 267 P.3d at 462-463 (internal citations omitted).

Here, the "error" was that Mr. Evans was seized without probable

cause. The search that discovered the firearm in the bag was derived from this initial unlawful seizure. As will be discussed in further detail below, because the initial seizure was unlawful, all evidence derived from the seizure was inadmissible. Therefore, the "error" of the unlawful seizure contributed significantly to the finding of guilt since, without the evidence derived from the unlawful seizure, the State would have had insufficient evidence to convict Mr. Evans.

The unlawful seizure of Mr. Evans may be challenged for the first time on appeal under RAP 2.5(a)(3) because it is an error of constitutional magnitude, the prejudice of the error is manifest in the trial record, and the error was not harmless.

(b) Mr. Evans was arrested when he was ordered out of the home and handcuffed.

Whether an encounter with police is permissive or a seizure is a mixed question of law and fact, but whether the facts may be characterized as a seizure is a legal question that the Court reviews de novo. *State v. Rankin*, 151 Wn.2d 689, 709, 92 P.3d 202 (2004). The appellant bears the burden of establishing that he was illegally seized. *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). If a warrantless search or seizure occurred, the State has the burden of justifying it. *State v. Jackson*, 82 Wn.App. 594, 601–02, 918 P.2d 945

(1996), *review denied* 131 Wn.2d 1006, 932 P.2d 644 (1997).

A person is "seized" under the Fourth Amendment where, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *State v. Armenta*, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997), *quoting United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980); *Young*, 135 Wn.2d at 509-10, 957 P.2d 681 (A person is under arrest for constitutional purposes when, by means of physical force or a show of authority, his freedom of movement is restrained), *citing United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980). Mr. Evans was not merely "detained," but was arrested when, surrounded by at least four police officers, he was ordered to lie face down on the ground and handcuffed, as Officer Hamilton recorded in his report. *See* CP 56 ("Date/Time Arrested: 3/14/2012 18:03:00").

(c) The arresting officers had no basis to conclude that the information from the 911 call was "reasonably trustworthy," and conducted no investigation of their own before arresting Mr. Evans.

> Probable cause [to arrest] exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed. . . . A bare suspicion of criminal activity, however, will not give an officer probable cause to arrest.

State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986), *cert. denied*, 499 U.S. 979, 111 S.Ct. 1631, 113 L.Ed.2d 726 (1991) (emphasis added).

The determination of whether a police officer had probable cause to arrest is based upon "the totality of facts and circumstances within the officer's knowledge at the time of the arrest." *State v. Knighten,* 109 Wn.2d 896, 899, 748 P.2d 1118 (1988) (quoting *State v. Fricks,* 91 Wn.2d 391, 398–99, 588 P.2d 1328 (1979)).

The facts and circumstances known to the Lakewood police officers at the time of the arrest consisted of what they observed in less than three minutes "from places of cover" (RP 6, lines 23-24), i.e., a woman standing outside apartment 17 talking on a cell phone and a man sitting in a chair inside apartment 17. The information the officers had received from LESA Dispatch was that one Mr. Johann called 911 and said that his neighbor told him there was a man in her apartment holding her daughter inside at gunpoint.

Suspicion sufficient to conduct a seizure **cannot** be based on an informant's tip alone **unless the tip possesses sufficient "indicia of reliability**." *State v. Sieler*, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980) (emphasis added). "Indicia of reliability" requires: (1) knowledge that the source of the information is reliable, **and** (2) a sufficient factual basis for

the informant's tip or corroboration by independent police observation. *Campbell v. Department of Licensing*, 31 Wn.App. 833, 835, 644 P.2d 1219 (1982) (emphasis added).

> It is difficult to conceive of a tip more 'completely lacking in indicia of reliability' than one provided by a completely anonymous and unidentifiable informer, containing no more than a conclusionary assertion that a certain individual is engaged in criminal activity. While the police may have a duty to investigate tips which sound reasonable, (1) absent circumstances suggesting the informant's reliability, or some corroborative observation which suggests either (2) the presence of criminal activity or (3) that the informer's information was obtained in a reliable fashion, a forcible stop based solely upon such information is not permissible.

State v. Lesnick, 84 Wn.2d 940, 944, 530 P.2d 243, *cert. denied* 423 U.S. 891, 96 S.Ct. 187, 46 L.Ed.2d 122 (1975).

In *Lesnick*, an anonymous telephone informant told police that a van was carrying illegal gambling devices. He did not indicate how he reached this conclusion but did describe the van and report its license number. The police quickly located a van fitting the description provided by the informant, but some of the numerals of the license number had been transposed. The police followed the van for a short distance, and although they had observed no criminal activity, the police pulled the van over. Gambling devices were in plain view after the stop. *Lesnick*, 84 Wn.2d at 941-42, 530 P.2d 243.

The *Lesnick* court held that the anonymous informant's accurate description of the vehicle was "not such corroboration or indicia of reliability" which would provide the police with a well-founded suspicion to justify an investigatory detention, and held that the seizure and search of the van were unconstitutional. *Lesnick*, 84 Wn.2d at 943, 530 P.2d 243.

In *Sieler*, a parent picking up his child from school observed what he thought was a drug sale in another car in the parking lot. The parent informed the school secretary by telephone of his conclusion, described the other car, reported its license number, apparently gave her his telephone number, and left.

The secretary called the police and officers were quickly informed by radio that a drug transaction had possibly occurred in the school parking lot in a black-over-gold Dodge with a certain license number. No details of the transaction were given. While proceeding to the high school, one of the officers radioed for information on how the sale was discovered and asked if the informant had been identified. The officers were simply told that a named person had concluded a drug transaction had occurred, but that he was not available. The officers knew nothing about the informant beyond his name, nor why he concluded a drug transaction had occurred. One officer, by radio, attempted to obtain a description of the suspects, but apparently none was available. In the

officer's words, "all we had to go on was the vehicle description."

The school vice-principal had talked to the occupants of the car a few minutes before the officers' arrival. He identified two girls as students. The defendants were not students. The four were playing cards. The vice-principal informed the officers before they went over to the car containing the defendants that he had not observed any contraband, nor even anything unusual or suspicious.

The car fit the description given by the informant, except one letter of the license number was incorrect. The driver was approached by one officer and the front passenger was approached by another officer. While talking to the driver, an officer smelled the faint odor of stale burnt marijuana. The officer examined the driver's identification, and asked him to enter his police car for questioning. After the driver had exited, the officer who contacted the front passenger saw three pills of "speed" on the driver's seat which he had been unable to observe prior to the driver's departure from the car. The officer picked up the pills, and immediately after he did so, the passenger handed the officer a film container containing speed. Both defendants were arrested and confessed.

Pre-trial, both defendants moved to suppress the pills and the confessions, but the motion was denied. Both defendants were found guilty of delivering amphetamines and the Court of Appeals affirmed their

convictions. The defendants appealed to the Washington Supreme Court arguing, inter *alia*, the tip provided by the parent did not justify investigatory detention and questioning of the defendants, since it did not provide the police with a well-founded suspicion of criminal activity by the defendants.

The Washington Supreme Court held that the trial court erred in denying the motion to suppress the pills and confessions, finding that the facts of the case were insufficient to satisfy the three *Lesnick* criteria to establish the credibility of an informant's tip:

The *Sieler* court held that the first *Lesnick* factor, "circumstances suggesting the informant's reliability," could not be met because,

> the facts of [*Sieler*] indicate reliability no more than those of *Lesnick*. To distinguish *Lesnick*, the Court of Appeals relied upon the fact that the informant had given his name to the school secretary. We are not persuaded by this attempted distinction. **The reliability of an anonymous telephone informant is not significantly different from the reliability of a named but unknown telephone informant**. Such an informant could easily fabricate an alias, and thereby remain, like an anonymous informant, unidentifiable.
>
> Even assuming that an unknown but named telephone informant was adequately reliable, thereby distinguishing this case from *Lesnick*, **this reliability by itself generally does not justify an investigatory detention**. Although there is some authority to the contrary, **the State generally should not be allowed to detain and question an individual based on a reliable informant's tip which is merely a bare conclusion unsupported by a sufficient**

> **factual basis which is disclosed to the police prior to the detention**. Some underlying factual justification for the informant's conclusion must be revealed so that an assessment of the probable accuracy of the informant's conclusion can be made. **It simply "makes no sense to require some 'indicia of reliability' that the informer is personally reliable but nothing at all concerning the source of his information ..."** This additional requirement helps prevent investigatory detentions made on the basis of a tip provided by an honest informant who misconstrued innocent conduct. It also reduces such detentions when an informant, who has given accurate information in the past, decides to fabricate an allegation of criminal activity.
>
> **Even if the reliability of the informant had been established in this case, the detention and questioning of defendants was unconstitutional.** The police conducted an investigatory detention based upon an informant's bare conclusion unsupported by any factual foundation known to the police.

Sieler, 95 Wn.2d at 48-49, 621 P.2d 1272 (internal citations omitted) (emphasis added).

The *Sieler* court also held that the facts of that case did not satisfy the second *Lesnick*, criterion, independent police observation of activity which suggests criminal activity: "The State clearly cannot satisfy *Lesnick's* second criterion. After arriving at the scene, the police proceeded almost immediately to the car containing the defendants. Prior to their approach to the car, they did not observe any conduct which tended to corroborate the informant's tip that criminal activity was present." *Sieler*, 95 Wn.2d at 49, 621 P.2d 1272.

Finally, the *Sieler* court held that the facts of the case also did not meet the third *Lesnick* criterion, independent police observation of facts that suggest that the informant's information was obtained in a reliable fashion: "Nor can the State satisfy *Lesnick*'s third criterion. As we held in that case, police observation of a vehicle which substantially conforms to the description given by an unknown informant does not constitute sufficient corroboration to indicate that the informant obtained his information in a reliable fashion." *Sieler*, 95 Wn.2d at 49-50, 621 P.2d 1272.

Officer Grant ordered Mr. Evans to come out of the apartment and ordered him to lay face down on the ground. *Id.* Mr. Evans was handcuffed (RP 13, line 18) and arrested at 6:03 p.m. (CP 56), three minutes after the officers had arrived on the scene. No police investigation whatsoever took place before Mr. Evans was arrested.

The officers had no idea who Mr. Johann was or who his neighbor was at the time they arrested Mr. Evans. They had absolutely no way of knowing whether the information from the 911 call was "reasonably trustworthy." In fact, Officer Prater testified at the CrR 3.5/3.6 hearing that police went to the reported location to "investigate and see whether or not that was actually occurring." RP 6, lines 2-3. However, the officers did not investigate at all before they arrested Mr. Evans. They simply

arrested him without probable cause.

(d) Because Mr. Evans' arrest was illegal, all evidence obtained after Mr. Evens was arrested must be suppressed.

> Evidence obtained directly or indirectly through exploitation of an unconstitutional police action must be suppressed, unless the secondary evidence is sufficiently attenuated from the illegality as to dissipate the taint.

Wong Sun v. United States, 371 U.S. 471, 491, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

> When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and **must be suppressed**. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). Under article I, section 7, **suppression is constitutionally required**. *State v. White*, 97 Wn.2d 92, 110–12, 640 P.2d 1061 (1982); *State v. Boland*, 115 Wn.2d 571, 582–83, 800 P.2d 1112 (1990). We affirm this rule today, noting **our constitutionally mandated exclusionary rule "saves article 1, section 7 from becoming a meaningless promise**." Sanford E. Pitler, The Origin and Development of Washington's Independent Exclusionary Rule: Constitutional Right and Constitutionally Compelled Remedy, 61 Wn. L.Rev. 459, 508 (1986). Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence. *State v. Crawley*, 61 Wn.App. 29, 34–35, 808 P.2d 773 (1991).

State v. Ladson, 138 Wn.2d 343, 359-360, 979 P.2d 833 (1999) (emphasis added).

The State exclusionary rule under Article 1, § 7 serves a different purpose than does the Federal exclusionary rule under the Fourth

Amendment:

> The federal exclusionary rule is a judicially-created prophylactic measure designed to deter police misconduct. It applies only when the benefits of its deterrent effect outweigh the cost to society of impairment to the truth-seeking function of criminal trials. In contrast, the state exclusionary rule is constitutionally mandated, exists primarily to vindicate personal privacy rights, and strictly requires the exclusion of evidence obtained by unlawful governmental intrusions.

State v. Chenoweth, 160 Wn.2d 454, 472 n. 14, 158 P.3d 595 (2007) (emphasis added).

Thus, unlike the Federal exclusionary rule, the exclusionary rule in Washington is mandatory and requires the suppression of all unlawfully discovered evidence.

In this case, the facts and circumstances within the arresting officers' knowledge at the time of Mr. Evans' arrest were that an unknown individual who gave his name as Johann called 911 and reported that his unidentified neighbor told him there was a man in her apartment "that had her daughter held at gunpoint." CP 68. Police had no other information about Mr. Johann or his unidentified neighbor, and thus had no idea whether the information provided by Mr. Johann was "reasonably trustworthy." Police lacked probable cause to arrest Mr. Johann at 6:03 p.m., and under Washington law, all subsequently discovered evidence, including statements made by Mr. Evans and the weapons found in the

"man purse," must be excluded.

The Court should vacate Mr. Evans' convictions and remand for a new trial at which all evidence discovered pursuant to his unlawful arrest is suppressed.

2. Defense counsel provided ineffective assistance of counsel.

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480 (9th Cir. 2000), *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183, *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel.").

A claim of ineffective assistance of counsel is reviewed de novo. *State v. Shaver,* 116 Wn.App. 375, 382, 65 P.3d 688 (2003). To prevail on an ineffective assistance of counsel claim, a defendant must establish that (1) his counsel's performance was deficient and (2) the deficient performance was prejudicial. *Strickland v. Washington,* 466 U.S. 668, 688-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (*citing State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

(a) Defense counsel rendered ineffective assistance by failing to seek suppression of evidence based upon the illegal arrest of Mr. Evans.

When a claim of constitutional error for failure to suppress evidence is raised for the first time on appeal because no motion to suppress was made at the trial court, the party raising the issue must show that the trial court would have likely granted the suppression motion had it been made. *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995); s*ee also Contreras*, 92 Wn.App. at 312, 966 P.2d 915, ("Where the alleged constitutional error arises from trial counsel's failure to move to suppress, the defendant "must show the trial court likely would have granted the motion if made. It is not enough that the Defendant allege prejudice actual prejudice must appear in the record.")

As discussed above, there was not probable cause to justify the arrest of Mr. Evans, and thus, suppression of all evidence obtained by the police after the arrest was mandatory under Washington law. Absent the post-arrest statements obtained from witnesses and from Mr. Evans and

absent the firearm found in the "man bag," there was no evidence whatsoever to support conviction of Mr. Evans for unlawful possession of a firearm in the second degree. Defense counsel's failure to seek suppression of evidence based on Mr. Evans' illegal arrest falls below an objective standard of reasonableness. There is no strategy or tactical decision that could possibly justify failure to seek suppression of evidence based upon the illegal arrest in this case.

Had the evidence been suppressed, which was mandatory, the charge against Mr. Evans would have been dismissed. Mr. Evans was prejudiced by his counsel's deficient performance because all of the post-arrest evidence was admitted, and Mr. Evans was convicted.

The Court should vacate Mr. Evans' conviction and remand for a new trial at which all evidence discovered subsequent to the illegal arrest is suppressed.

(b) Defense counsel rendered ineffective assistance by encouraging Mr. Evans to sign the "Statement of Defendant as to Stipulation to the Sufficiency of the Evidence to Support the Charge."

In this case, after the trial court denied the motion for suppression of evidence, defense counsel stated, "I have spoken with Mr. Evans regarding a stipulation to -- or doing a stipulated trial, and he has agreed to that." RP 50, lines 5-7. A "stipulated trial," sometimes called a

"stipulated bench trial" or "stipulated facts trial," is authorized by CrR 6.1(a).

> In a stipulated facts trial, the judge or jury still determines the defendant's guilt or innocence; the State must prove beyond a reasonable doubt the defendant's guilt; and the defendant is not precluded from offering evidence or cross-examining witnesses but in essence, by the stipulation, agrees that what the State presents is what the witnesses would say.

State v. Johnson, 104 Wn.2d 338, 343, 705 P.2d 773 (1985) (emphasis added).

In this case, in spite of his counsel's representation to the trial court, Mr. Evans did not agree to a "stipulated trial." With the encouragement of his counsel, Mr. Evans stipulated to his guilt. A stipulation is "only an admission that if the State's witnesses were called, they would testify in accordance with the summary presented by the prosecutor." *State v. Wiley,* 26 Wn. App. 422, 425, 613 P.2d 549, *review denied* 94 Wash.2d 1014 (1980).

Here, the waiver of rights in the stipulation signed by Mr. Evans mirrors the "Statement of Defendant on Plea of Guilty to Non-Sex Offense" set out in CrR 4.2(g). Beyond stipulating that if the State's witnesses were called, they would testify in accordance with the summary presented by the prosecutor, Mr. Evans agreed that "the State's evidence is sufficient to support each and every element of the crime alleged," gave

up the right to contest sufficiency of the State's evidence, gave up the right to refuse to testify against himself, gave up the right to hear and question witnesses who would testify against him, gave up the right to testify and have witnesses testify for him, gave up the right to be presumed innocent unless entering a guilty plea or unless the State proved the charge beyond a reasonable doubt, and stipulated that "the State has sufficient evidence in the form of the police reports and the testimony of Officers Prater and Hamilton, to prove each and every element of the crime charged beyond a reasonable doubt." CP 35-37. The Stipulation signed by Mr. Evans was far more than a stipulation to facts: it was a stipulation that he was guilty.

> THE COURT: So he is stipulating to the sufficiency of the evidence; not just the admissibility of it, but the sufficiency of it without the Court reviewing it?
>
> MS. MARTIN: That's what it said and, yes, that's what we decided to do.
>
> THE COURT: Okay. All right.
>
> MS. MARTIN: But we are attaching, also, the police reports for your review.
>
> THE COURT: Would you like me to review those, as well?
>
> MS. MARTIN: I would stipulate that there are facts sufficient in there.
>
> THE COURT: Okay.

. . .

> THE COURT: So you are stipulating that there is sufficient evidence to find you guilty, applying a standard of proof beyond a reasonable doubt?
>
> THE DEFENDANT: Yes, your Honor.

RP 52, lines11-24; RP 54, lines 6-9.

There is no court rule or case law that authorizes such a stipulation. The facts that the trial court looked at the police reports and that the trial court conducted a "colloquy" to determine whether Mr. Evans entered into the agreement with full understanding of what he was doing do not somehow legitimize the stipulation to guilt.

Had the agreement truly been a stipulation to trial by the court as authorized by CrR 6.1(a), Mr. Evans would not have given up his presumption of innocence and would not have agreed that the State's evidence was sufficient to support a finding of guilt. *Johnson,* 104 Wn.2d at 343, 705 P.2d 773.

Mr. Evans did not enter a formal guilty plea.[2] Mr. Evans waived his right to a jury trial on advice of his counsel, but then was also denied a stipulated facts bench trial by the provisions of the improper stipulation, which he signed on advice of his counsel. *See* RP 51, lines 14-25. Mr. Evans' trial counsel rendered ineffective assistance by advising him to

[2] *See,* however, CP 43, Mr. Evans' Judgment and Sentence, in which it is incorrectly indicated that "the defendant was found guilty on 6-26-12 by plea."

sign the stipulation to his guilt, even as she represented to the trial court that "[w]e are here to do a stipulated trial based on the evidence presented." RP 52, lines 1-4.

i. Mr. Evans' trial counsel made a tactical choice outside the range of professionally competent assistance.

In general, a stipulation as to facts is a tactical decision. *State v. Mierz,* 127 Wn.2d 460, 476, 901 P.2d 286 (1995). However, "deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance." *State v. Ashue,* 145 Wn. App. 492, 506, 188 P.3d 522 (2008). In this case, defense counsel stipulated not only to the facts that would be presented by the State's witnesses, but also that those facts were sufficient to support a finding of guilt. That tactical choice fell outside the range of competent assistance.

ii. Defense counsel's tactical choice prejudiced Mr. Evans because he was denied due process and his constitutional right to a trial.

In Washington, "[t]here can be no question ... the Federal and our state constitutions guarantee to a defendant a trial before an impartial tribunal, be it judge or jury." *State v. Read,* 147 Wn.2d 238, 250, 53 P.3d 26 (2002) (quoting *State ex rel. McFerran v. Justice Court of Evangeline*

Starr, 32 Wn.2d 544, 548-49, 202 P.2d 927 (1949)).

The provisions of the stipulation presented to the Court by Mr. Evans' counsel (CP 38) denied Mr. Evans a trial based on stipulated facts, which trial counsel erroneously represented she was seeking. Under the stipulation, Mr. Evans was precluded from testifying, presenting witnesses, or cross-examining the State's witnesses. The fact that, before entering its finding of guilt, the trial court read the police reports that Mr. Evans had agreed were sufficient to establish every element of the charge against him does not change the fact that Mr. Evans, who did not enter a guilty plea, was denied his constitutional right to any trial at all, including a stipulated facts bench trial that he thought he would receive.

"In the criminal context, due process requires that a criminal defendant be given notice prior to deprivation of a substantial right. *City of Seattle v. Klein,* 161 Wn.2d 554, 566, 166 P.3d 1149 (2007) (citing *City of Seattle v. Agrellas,* 80 Wn.App. 130, 136–37, 906 P.2d 995 (1995). (citing *State v. Fleming,* 41 Wn.App. 33, 35–36, 701 P.2d 815 (1985)). Here, Mr. Evans was denied the right to a trial after his counsel advised him to agree to sign the "Statement of Defendant as to Stipulation to the Sufficiency of the Evidence to Support the Charge." He had no notice that he would be deprived of the right to any trial at all. Article 1, § 3 of the Washington Constitution mandates that "No person shall be deprived of

life, liberty, or property, without due process of law." Mr. Evans was deprived of liberty without due process of law, in violation of Washington Constitution Article 1, § 3. Defense counsel's ineffective assistance was, without question, prejudicial to Mr. Evans.

The process through which Mr. Evans' conviction was obtained is not a process recognized or authorized in Washington law. Under CrR 4.2(a), a defendant may only enter three kinds of pleas: not guilty; not guilty by reason of insanity; or guilty. As stated above, in a stipulated facts bench trial, the stipulation is that the trial court will independently review the evidence and make a determination as to innocence or guilt. *See Johnson,* 104 Wn.2d 338, 343, 705 P.2d 773.

Mr. Evans never pled guilty, nor did Mr. Evans receive a true bench trial. Instead, Mr. Evans' trial counsel and the State concocted a hybrid stipulation that was neither a pure guilty plea nor a pure stipulation to bench trial where the trial court would determine his guilt or innocence. The process imagined by trial counsel and sanctioned by the trial court is not a legally recognized method of resolving a criminal prosecution in Washington.

The Court should vacate Mr. Evans' conviction, and remand for resolution of the case by an authorized process.

VI. CONCLUSION

Mr. Evans was arrested without probable cause, which, under Washington law, requires suppression of all evidence subsequently discovered.

Mr. Evans' counsel rendered ineffective assistance in failing to seek suppression of the evidence obtained following the illegal arrest and in advising Mr. Evans to stipulate to guilt while characterizing the stipulation as one to a "stipulated trial." Mr. Evans was denied his constitutional right to a trial without notice, which was a violation of his right to due process.

The Court should vacate Mr. Evans' conviction and remand for a new trial, at which all evidence discovered subsequent to his illegal arrest is suppressed.

DATED this 7th day of January, 2013.

Respectfully submitted,

/s/
Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on January 7, 2013, she delivered by e-mail to the Pierce County Prosecutor's Office, pcpatcecf@co.pierce.wa.us Tacoma, Washington 98402, and by United States Mail to appellant, Lance W. Evans, 105 Beckett Lane Southwest, Orting, Washington 98360, true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on January 7, 2013.

/s/
Norma Kinter

ARNOLD LAW OFFICE

January 07, 2013 - 10:22 AM

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